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September 26, 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Attention: Stop Code 1400

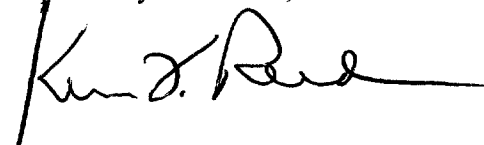
Re: *In re Application of Rainbow Broadcasting Company*
GC Docket No. 95-172
File No. BMPCT-910625KP
File No. BMPCT-910125KE
File No. BTCCT-911129KT

Dear Sir or Madam:

On behalf of Guy Gannett Communications ("Gannett"), we submit herewith an original plus four copies of a PETITION FOR LEAVE TO INTERVENE TO FILE EXCEPTIONS AND REOPEN THE RECORD regarding the above proceeding.

Should any questions arise concerning this filing, kindly contact the undersigned.

Respectfully submitted,


Kevin F. Reed

Enclosure

cc: Individuals on Service List

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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SEP 26 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of)	
Rainbow Broadcasting Company)	GC Docket No. 95-172
)	File No. BMPCT-910625KP
For an Extension of Time to Construct)	File No. BMPCT-910125KE
and)	File No. BTCCT-911129KT
For an Assignment of its)	
Construction Permit for Station)	
WRBW(TV), Orlando, Florida)	

To: The Commission

**PETITION FOR LEAVE TO INTERVENE
TO FILE EXCEPTIONS AND REOPEN THE RECORD**

Guy Gannett Communications ("Gannett"), by its attorneys and pursuant to Section 309(e) of the Communications Act of 1934, as amended, and Section 1.223 of the Commission's rules, hereby petitions to intervene in the above-captioned proceeding in order to file exceptions to the Initial Decision of the Administrative Law Judge ("ALJ"). Gannett was not a party to the proceeding and neither supports nor opposes the application of Rainbow Broadcasting Company ("Rainbow"), which the ALJ granted. Gannett seeks to intervene at this stage of the proceeding because the ALJ gratuitously and erroneously concluded that Gannett's conduct, in constructing a tower and transmitter building to be used by Rainbow, was "suspicious" and that further consideration of that conduct by the Commission may be warranted. Nothing in the record supports such conclusions, and the Commission should remand the matter to the ALJ and direct that they be deleted from the decision. Alternatively, the Commission should reopen the record to permit the inclusion of the attached Affidavit, which demonstrates that the suspicions of the ALJ not only have no basis in the currently existing record but also that they have no factual basis at all.

I. BACKGROUND: The Tower Litigation Misrepresentation Issue.

Gannett became part of the cast of characters in this proceeding only because, in its previous applications for extensions of time to construct facilities, Rainbow had asserted that a dispute with Gannett over the construction of a tower to be used by Rainbow was one of the reasons that construction of its own facilities had not been completed in a timely manner. One of the parties opposing Rainbow's application, Press Broadcasting Company, Inc. ("Press") had alleged that Rainbow's assertion constituted a misrepresentation and an attempt to deceive the Commission, insofar as Rainbow failed to disclose that it had initiated the litigation with Gannett that had delayed construction and was therefore itself responsible for the delay.

The ALJ concluded that Rainbow had not engaged in misrepresentation. In essence, the ALJ found that although the litigation brought by Rainbow had resulted in a court order preserving the status quo and therefore preventing Gannett from constructing the tower, Gannett had refused to begin construction even prior to the status quo order. Therefore, the ALJ found that Rainbow had been truthful in asserting that its dispute with Gannett had delayed its ability to deploy its facilities, even apart from the lawsuit that Rainbow had itself initiated. But the ALJ went one step further. Although specifically stating that "[t]he reasons for Gannett's failure to undertake construction are *not disclosed by the record*," the ALJ found that "since there does not appear to have been any barrier preventing Gannett from constructing the transmitter building, it is reasonable to *infer* that Gannett did not intend to construct the building until Press was included as a tenant."^{1/} This inference, according to the ALJ, "raises suspicions about the conduct

^{1/} *Rainbow Broadcasting Company*, 12 FCC Rcd 4028, 4048 (1997) (emphasis added) ("*Initial Decision*").

of Gannett and the possible complicity of Press.”^{2/} The ALJ suggested that “[w]hile the actions of Gannett and Press are outside the purview of this hearing, the Commission may wish to further consider this matter.”^{3/}

The implication that Gannett engaged in wrongful behavior of any sort and, specifically, that it colluded with Press in delaying construction of the transmitter facilities is harmful to Gannett. Wholly apart from any damage to Gannett’s reputation that may result from the ALJ’s findings—and from the repetition of those findings in subsequent proceedings^{4/}—Gannett, as a broadcast licensee, cannot simply turn the other cheek to suggestions of wrongdoing that implicate its corporate character, and, by extension, the character of its officers responsible for implementing corporate decisions. Indeed, the potential harm of the ALJ’s findings is highlighted by the ALJ’s suggestion that the Commission further investigate the suspected misconduct.

The findings of the ALJ are not merely harmful to Gannett. They are wrong. There is no basis in the record for the inference of wrongdoing drawn by the ALJ—and ample evidence to suggest that Gannett’s delay in constructing facilities for Rainbow was the result of Rainbow’s own delay in securing a construction permit and in responding to inquiries from Gannett. Furthermore, while Gannett had no reason to suspect that its own conduct would be at issue in

^{2/} *Id.* at 4059.

^{3/} *Id.* n.21.

^{4/} Rainbow has already introduced the ALJ’s statements in its petition to deny the renewal of Press’s license for Television Station WKCF-TV, Clermont, Florida. *See Rainbow’s Supplement to Petition to Deny*, File No. BRCT-9610001ZK. In that proceeding, Rainbow has repeatedly suggested that Press and Gannett conspired to keep Rainbow off the Bithlo Tower, *id.* ¶¶ 9-11, 13-14, and has urged the Commission to investigate Gannett’s delay in construction to determine whether Press played any role. *Reply to Opposition to Supplement to Petition to Deny*, File No. BRCT-961001ZK, ¶ 11.

this proceeding and therefore neither intervened nor submitted its own evidence or testimony, the Affidavit of James Baker confirms beyond doubt that Gannett's conduct was wholly reasonable, that it did not conspire with Press in determining whether or when to construct facilities for Rainbow, and that the delay in the construction of Rainbow's facilities resulted, first, from Rainbow's inability to secure a construction permit; second, from Rainbow's delay in responding to inquiries from Gannett; and, finally, from the status quo order in the lawsuit brought by Rainbow to prevent Gannett from leasing additional space on its tower to Press.

II. THE RECORD DOES NOT SUPPORT THE FINDINGS IN THE INITIAL DECISION.

The ALJ's inference of "suspicious" behavior on Gannett's part was principally based on correspondence and events occurring in 1990, beginning shortly before Rainbow's construction permit became final on August 30, 1990 and ending when the status quo order in Rainbow's lawsuit was entered on November 27, 1990. Although the lease between Rainbow and Gannett was executed in 1986, there is no indication in the record or in the Initial Decision of any desire, much less any urgency, on Rainbow's part that its tower facilities be built by Gannett (at Rainbow's expense) prior to 1990, when final approval of Rainbow's construction permit was imminent. Indeed, under the explicit terms of the lease, not only was Gannett not obligated to begin construction before Rainbow had obtained final approval of its construction permit; it had the right to *terminate* the lease if Rainbow did not obtain such approval within a year of applying for the permit.^{5/} Gannett did not exercise its right to terminate.^{6/} It is only reasonable to assume

^{5/} Gannett-Rainbow Lease Agreement art. IV.

^{6/} Indeed, during the years following execution of the lease and prior to final approval of the construction permit, Gannett agreed on several occasions to allow Rainbow to defer a

that Gannett would have exercised its termination right had it been conspiring with Press to keep Rainbow off the tower as the ALJ suggested.

Not until August 10, 1990, did Rainbow indicate to Gannett that it had a “desire to proceed as quickly as possible” because it finally had “a clear path to construct the facility.”^{7/} From that date until the entry of the status quo order less than four months later, nothing in the record remotely indicates foot dragging or a “lack of diligence” on Gannett’s part in fulfilling its obligations under the lease. Documents in the record show that between August 23 and October 2, 1990, Gannett and Rainbow had been corresponding, meeting, and making progress towards construction of facilities that would be deemed suitable to Rainbow. But on October 2, 1990, Rainbow indicated to Gannett that it would not proceed to build its station if Gannett also leased comparable space to Press^{8/}—and that ultimatum obviously interrupted further progress, since Gannett knew its lease with Rainbow was non-exclusive and intended to lease comparable space to Press. One month later, after an exchange of correspondence confirming the parties’ fundamental disagreement over their rights under the lease agreement, Rainbow filed its lawsuit

portion of the rental payments due under the lease—although, since Gannett was not a party to the proceeding below and Rainbow did not disclose it, that fact was not in the record before the ALJ. *See Baker Affidavit.*

^{7/} *Initial Decision* at 4045. As the Initial Decision points out, Gannett had been preparing to construct Rainbow’s facilities while Rainbow’s application for a construction permit was pending. In “late 1989 or early January of 1990,” Gannett had “sought information from [Rainbow] regarding the antenna mounting and the proposed transmitter building.” *Id.* at 4045. Rainbow responded at the end of January, requesting further technical information from Gannett that it claimed was necessary to enable it to respond to Gannett’s inquiry. Gannett did not compile a response to this information—*nor did Rainbow press Gannett for a response*—during the next several months, until approval of its construction permit appeared imminent on August 10, 1990.

^{8/} *See id.* at 4046.

to enjoin Gannett from leasing space to Press—and less than a month after that, the court entered the status quo order, which, according to the ALJ, precluded further construction by Gannett.

In sum, there was nothing “suspicious” about Gannett’s failure to begin construction of Rainbow’s facility during the four years after the lease was signed, before it was clear when—if ever—Rainbow would obtain final approval of its construction permit and be prepared to begin construction. Nor is there any basis for inferring wrongdoing or “dilatory” conduct on Gannett’s part in 1990, after Rainbow indicated that its permit was about to become final and that it desired to proceed at last. The evidence indicates good faith progress and no rancor between the parties during that period—until the dispute over Press’s access to Gannett’s tower raised the prospect that the lease agreement might be terminated. Furthermore, there is no basis for concluding that Gannett’s position in that dispute was wrong, much less that it was so untenable as to raise “suspensions” of “dilatory” conduct.^{9/} Finally, there is not a shred of evidence that Gannett conspired or colluded with Press to delay construction of Rainbow’s facilities and keep Rainbow off Gannett’s tower.

For all these reasons, the Commission should direct that the Initial Decision be amended to strike the unwarranted and disparaging suggestions of improper conduct by Gannett—and, in

^{9/} The ALJ noted, on the basis of testimony from Rainbow, that the lawsuit “was eventually settled with Gannett paying [Rainbow] a substantial sum of money for [Rainbow] giving consent to allow another antenna on the same 1500 foot aperture.” *Id* at 4050 n.13. A settlement is not, of course, evidence of wrongdoing and provides no basis even for “suspensions” as to the legal issues that were in dispute. The denial of Rainbow’s motion for a preliminary injunction, on the other hand, clearly indicates not only that Gannett’s position was tenable but also that Rainbow did not appear likely to prevail on the merits. Indeed, the court found that the language of the lease agreement unambiguously “does not grant ‘exclusive’ use of the top slot of the Bithlo Tower.” *Rey v. Gannett*, 766 F. Supp. 1146 (S.D. Fla. 1991).

particular, to strike the ALJ's suggestion that the Commission further investigate Gannett's conduct. These suggestions have no basis in the record, and, if left in place, will subject Gannett to wholly unwarranted mischief and harm.

III. IF THE ALJ'S SUGGESTIONS REGARDING GANNETT ARE NOT STRICKEN ON THE BASIS OF THE RECORD, THEN THE RECORD SHOULD BE REOPENED TO PERMIT GANNETT TO SUBMIT FURTHER EVIDENCE.

Because Gannett was not a party to the proceeding below and had no position regarding the application at stake in that proceeding, it provided no evidence or testimony. Yet, in the absence of such evidence or testimony, the ALJ inferred that Gannett had purposely delayed construction of Rainbow's facilities until Press was included as a tenant, stated his suspicions of complicity between Gannett and Press in delaying construction, and suggested that further investigation of this matter by the Commission might be appropriate. Even if the record provided some basis for the inferences and suspicions of the ALJ (which it does not), and even if the inferences and suspicions were relevant to the decision to grant or deny the application in this proceeding (which they are not), it would be inappropriate and unfair to include them in the findings and conclusions of the Initial Decision without allowing Gannett to submit evidence regarding "[t]he reasons for Gannett's failure to undertake construction."^{10/}

Section 1.276 of the Commission's Rules authorizes the Commission, "[p]rior to or after oral argument or the filing of exceptions or briefs, [to] reopen the record and/or remand the proceedings to the presiding officer to make further findings or conclusions."^{11/} If the

^{10/} *Id.* at 4048.

^{11/} 47 C.F.R. § 1.276.

Commission does not direct the ALJ to strike the groundless suggestions of wrongdoing by Gannett, it should reopen the record, pursuant to Section 1.276, to permit the inclusion of the attached Affidavit of James Baker, Chief Financial Officer and Treasurer of Guy Gannett Communications. Mr. Baker's Affidavit describes in detail the reasons for the delay in construction of Rainbow's facilities—reasons that have nothing to do with any lack of diligence or wrongdoing by Gannett, or with any improper collusion between Gannett and Press.

As detailed in the Affidavit, Gannett was instructed by Rainbow to hold off on constructing the transmitter building until Rainbow had obtained a "final" construction permit. When it became clear that in August 1990 Rainbow's construction permit would become final, Gannett took affirmative steps to address certain logistical matters and discrepancies between Rainbow's proposed building plans and Gannett's. In September 1990 Gannett and Rainbow were meeting and exchanging correspondence such that it appeared that Rainbow's personnel were pleased with the progress. Unexplainably, however, in early October 1990, Rainbow objected to Press's position on the tower—a fact it had known of for over two years.

Despite the nonexclusive provision in its contract and its acknowledgment of Press's position in FCC filings, Rainbow sought a preliminary injunction against Gannett in November 1990. Shortly thereafter a status quo order was imposed on the parties. Up to that point, Gannett was prepared to begin construction of the transmitter building and it was only Rainbow's own inaction that prevented the project from moving forward. Gannett's position as to Rainbow's rights to the tower was later validated when Rainbow's preliminary injunction was denied in June 1991 with a specific finding that the lease was nonexclusive. Thereafter, Gannett and Rainbow agreed to settle the civil suit. The terms of the settlement are confidential.

The Affidavit will also show that Gannett treated Rainbow fairly and on an equal footing with Press. As a matter of fact, Gannett, despite its right to terminate Rainbow's lease, made several financial accommodations to ensure that Rainbow would stay on the tower.

In addition, Mr. Baker's Affidavit demonstrates that there was no collusion between Gannett and Press. Since Gannett's lease with Rainbow was not exclusive and Gannett had space available on the tower, there was nothing preventing Gannett from entering into a contract with Press. From the time that Press initially contacted Gannett in May 1987 until the execution of the lease in June 1991, the contact between the parties was limited to arms length negotiation of the lease agreement. As a matter of fact, Gannett was open to Rainbow about its negotiations with Press—notifying Rainbow, out of courtesy and under no contractual obligation, of Press's likely tower position as early as April 1988.

For the reasons set forth in the previous section, the ALJ's suspicions regarding Gannett's conduct had no basis in the record and no proper place in the Initial Decision. The Baker Affidavit speaks directly to the Initial Decision's harmful statements regarding Gannett's conduct, and, as a matter of fundamental fairness, it should be admitted and considered before those statements are permitted to be part of the final decision. Inclusion of the Affidavit in the record will confirm that there is no basis in the record for the disparaging statements and that they should be stricken from the Initial Decision.

CONCLUSION

As a third party aggrieved by statements in the Initial Decision, Gannett should be permitted to intervene and file exceptions to those statements. The Initial Decision's suggestions of wrongdoing by Gannett are wholly without basis in the record and should be stricken.

If there is any doubt that this is the case, the Commission should direct that the record be reopened for the inclusion of the attached Affidavit—and, upon consideration of that Affidavit and the existing record, the Commission should strike all such suggestions of wrongdoing from the Initial Decision.

Respectfully submitted,

GUY GANNETT COMMUNICATIONS

By: Kevin F. Reed
Kevin F. Reed
Peter Siembab

Its Attorneys

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September 25, 1997

CERTIFICATE OF SERVICE

I, Deborah L. Gorham, a legal secretary at Dow, Lohnes & Albertson, PLLC, do hereby certify that on this 26th day of September, 1997, I sent the above "Petition for Leave to Intervene to File Exceptions and Reopen the Record," via first-class mail, postage-prepaid, to the following:

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Room 227
Washington, D.C. 20554

Mr. Roy J. Stewart
Chief - Mass Media Bureau
Federal Communications Commission
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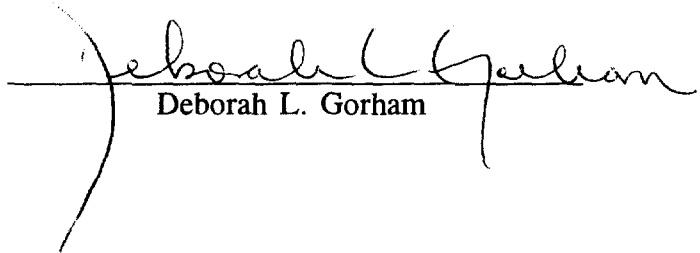
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Deborah L. Gorham

AFFIDAVIT OF JAMES E. BAKER

I, James E. Baker, being duly sworn according to law, hereby depose and say:

My name is James E. Baker and I am Chief Financial Officer and Treasurer of Guy Gannett Communications ("Gannett"). I have been employed at Gannett since 1975. My responsibilities in this position are to oversee all financial matters for Gannett and its subsidiaries.

Gannett owns and operates seven television stations. Gannett also owned a number of broadcasting towers used by television and radio stations. (Gannett sold its broadcast tower business in 1994). One such tower was located in Bithlo, Florida, near Orlando (the "Bithlo Tower") that was managed by a Gannett subsidiary, The Bithlo Tower Company. When sold, there were six tenants on the Bithlo Tower, including the owners of WBRW(TV), Rainbow Broadcasting Company ("Rainbow"); and WKCF(TV), Press Broadcasting Company, Inc. ("Press"). What follows is a chronological narrative of Gannett's relationship with Rainbow and Press.

It should be clear to any objective observer that Gannett has absolutely no motive to prefer one television broadcast tenant over another—Gannett's tower derives income from leasing space to broadcasters and the tower has sufficient space available to accommodate both Rainbow and Press. Gannett has no competitive interest at stake since it owns no television stations in the market.

In October 1985, Joseph Rey of Rainbow contacted Gannett about the possibility of leasing an antenna position and an accompanying transmitter building near the tower's base. By January 1986, Rainbow executed a lease agreement with Gannett which provides in Article I for an antenna position on the Bithlo Tower and space in an unbuilt transmitter building for

Rainbow's equipment on a "limited and non-exclusive basis". A copy of the lease is attached hereto as Exhibit 1. The lease required Rainbow to bear the costs of constructing the transmitter building including providing names and references of a preferred contractor to perform the construction work. Gannett, in turn, promised to construct the transmitter building with reasonable promptness and diligence. The lease also allowed Gannett to terminate Rainbow's rights if Rainbow did not obtain a FCC construction permit within a specified time. Four years into the term of the lease Rainbow still did not have a final construction permit. Nonetheless recognizing the value of holding onto a tenant, Gannett chose not to exercise this termination right.

Upon execution of the lease, Gannett was ready to help Rainbow become operational including starting construction of the transmitter building. However, shortly after Rainbow obtained a construction permit, the FCC initiated a review of its minority ownership policies in November 1986. Pending the outcome of those proceedings, Rainbow's construction permit was held in abeyance.

I was disappointed that Rainbow's plans were delayed, but Gannett remained ready to move ahead with construction at whatever pace Rainbow requested. Gannett continued to request bids from contractors for the transmitter building to ensure it would be prepared to begin construction promptly upon request. On December 31, 1986, I received a memo from Gannett employee Chuck Sanford indicating that preparations for the transmitter building construction were proceeding smoothly. A copy of this memo is attached hereto as Exhibit 2. On April 6, 1987, I received a memo from Rick Edwards, Gannett's chief engineer, indicating that Rainbow's construction permit was still on hold but that Rainbow was still intent on constructing its

transmission facilities at the Bithlo Tower. A copy of this memo is attached hereto as Exhibit 3. Throughout this period, while Rainbow was awaiting FCC approval, Gannett remained committed to having Rainbow as a tenant.

Subsequently, we learned from Joe Rey that Rainbow would not be constructing the building until Rainbow had obtained a "final" construction permit from the FCC. This communication is consistent with Joe Rey's other business decisions concerning Rainbow at the time. For example, Joe Rey and Rainbow's investor, Howard Conant, agreed to defer formalizing their agreement into writing until the FCC's approval became final. *See Rainbow Broadcasting Company*, 12 FCC Rcd 4028, 4037-38 (1997) (the "*Initial Decision*").

In the spring of 1987, Press contacted Gannett about the possibility of becoming a tenant on the Bithlo Tower. The tower had space available for a television broadcaster in addition to Rainbow, and Gannett was interested in finding another tenant to occupy part of the same aperture on the tower as Rainbow. Clearly, there was no question that this aperture was still available since Rainbow's lease provided for a nonexclusive right to that position.

Following through on Press's inquiry, I sent Michael Male of Press a copy of Gannett's standard Bithlo Tower lease agreement on May 7, 1987. In the cover letter to the lease, I made special note that Press would be responsible for construction costs relating to the unbuilt transmitter building. A copy of this letter is attached hereto as Exhibit 4. This is the same term that had been negotiated with Rainbow and was consistent with Gannett's policy not to build the transmitter building on speculation.

Like Rainbow, Press was waiting for FCC approval before it could begin operating off of Bithlo Tower. For several months after the first inquiry, Gannett kept in contact with Press. A

copy of a letter from October 23, 1987, demonstrating Press's continued interest in the Bithlo Tower is attached hereto as Exhibit 5. By March 1988, Press was moving closer to receiving its requested FCC authorization and was increasingly interested in the details of leasing space on the tower. Gannett responded by sending Press another copy of the Bithlo Tower lease on March 29, 1988. A copy of this letter is attached hereto as Exhibit 6. By March 31, 1988, Gannett and Press were discussing the physical requirements for Press's space on Bithlo Tower. A copy of a letter from Rick Edwards at Gannett referencing Bithlo Tower construction plans and recommended changes is attached hereto as Exhibit 7.

Although Administrative Law Judge Chachkin's opinion, would have one believe that Rainbow first learned about Press's position on the tower in August 1990, *see Initial Decision* at 4045-46, in truth, Rainbow knew about Press's interest as early as April 7, 1988, when Rick Edwards, out of courtesy to Rainbow and under no contractual obligation, proposed to Joe Rey a plan in which Press's antenna would be mounted at the approximate same height as Rainbow's. Joe Rey responded on April 11, 1988, indicating that Rainbow's engineers would evaluate the technical ramifications of such a scenario. A copy of this letter is attached hereto as Exhibit 8. Joe Rey responded by stating that he would not give his consent, but Gannett had not sought consent since Rainbow's lease was nonexclusive. Nevertheless, Joe Rey's response clearly demonstrates that Rainbow was well aware of Press's location on the tower.

Even the following year Rainbow was clearly still considering the ramifications of Press's likely presence on the tower at the same height. On May 15, 1989, Rainbow filed comments with the FCC complaining about the affect Press's antenna on the Bithlo Tower would have on Rainbow's signal. A copy of Rainbow's comments are attached hereto as Exhibit 9. Gannett is

unsure as to why Joe Rey would claim he was unaware that Gannett was planning on leasing space to Press at the same aperture as Rainbow, *see* Tr. 731, 765-767, but his actions and written submission to the FCC clearly indicate that he was fully cognizant of Press's tower position for a couple of years and was taking steps to address it. Although Gannett was under no obligation to inform Rainbow about its negotiations with Press (Gannett, in fact, attempts to respect the confidentiality of all of its tenants) Gannett clearly was not hiding Press's plans from Rainbow.

Negotiations between Gannett and Press for a lease on the Bithlo Tower continued until June 25, 1991 when the parties executed a lease agreement. At no time during these negotiations did Gannett delay construction of the transmitter building due to the possibility of securing Press, or any other broadcaster, as a tenant.

Rainbow, however, as early as 1987 was evidently suffering financial difficulties. Joe Rey had asked for and received suspensions on annual rent increases for the tower lease in the summer of 1987. By early 1988, Rainbow had fallen behind in its monthly rent. A copy of a letter from Joe Rey referencing the rent increase suspension and the past due status of its account is attached hereto as Exhibit 8. Then, on or about May of 1988, Joe Rey expressed concern to Gannett about the financial drain of the lease agreement on Rainbow due to its difficulties in obtaining a final construction permit. He requested that Gannett make some financial accommodations, specifically, a rent deferral of \$2,100 per month for a two year period beginning October 1, 1987 to September 30, 1989. Rainbow proposed to pay back the money over a subsequent two year period from October 1989 to September 1991. Gannett agreed to Rey's deferral proposal and a written agreement was executed on August 31, 1988, a copy of which is attached hereto as Exhibit 10. Throughout this period Gannett was under no obligation

to assist Rainbow, or even to continue leasing space since Rainbow had received neither a final FCC permit nor an extension from Gannett. The lease with Rainbow gave Gannett the right to terminate under these circumstances. However, Gannett, as a landlord of a major broadcast tower with space available, and sensitive to Rainbow's financial difficulties, was ready to assist Rainbow to ensure it would remain as a tenant. I find it hard to believe that given Gannett's repeated accommodations to Rainbow that anyone could later accuse Gannett of colluding with Press or engaging in dilatory conduct.

In anticipation that its construction permit would shortly become final, on August 10, 1990, Joe Rey wrote to Rick Edwards declaring that Rainbow finally had a "clear path" to proceed and that it could not afford to wait any longer on construction of the transmitter building and would be erecting a transmitter building on its own at the tower's base. Rey's letter requested that Gannett establish the placement of the proposed building and listed the names and qualifications of an architect, contractor and electrician. I was shocked by this uncompromising demand. Gannett had heard from no one at Rainbow since January and was unaware of any such urgency on their part. Up to that point Gannett was operating under Rey's direction to wait until Rainbow had secured a final construction permit. Prior to receipt of this letter Gannett also was not in a position to obtain a building permit nor take any steps with respect to the construction while the status of Rainbow's construction permit remained uncertain. Without a final construction permit, there was no assurance that Rainbow would be a tenant available to pay for costs incurred. Inasmuch as the lease explicitly provided that Gannett would control all construction taking place on its property, Gannett was extremely uncomfortable with the prospect of Rainbow, or for that matter, any tenant undertaking construction on Gannett's land.

Gannett promptly responded to Rey's demands by sending him Gannett's blueprints for the transmitter building along with an invitation to set a meeting to discuss details on how to proceed. A copy of the cover letter accompanying these plans is attached as Exhibit 11. Gannett was anxious to resolve any discrepancies between Rainbow's plans and Gannett's and to coordinate certain logistical matters which Gannett had accomplished in the interim such as selecting a contractor and securing a building permit. Although Gannett and Rainbow had discussed these issues in 1986-1987, new plans were on the table and a couple of years had passed rendering those earlier discussions outdated. In addition, Gannett had revised the transmitter building plans because negotiations with Press were progressing and it appeared that if a building were going to be built, it should accommodate both Press and Rainbow as well as other tenants. As a result, Gannett had the plans revised to reflect a transmitter building that would house two television broadcasters and one FM broadcaster. The change ultimately provided for a more productive operation of the tower and certain economies of scale which resulted in significant savings to all the tenants.

Shortly after Rainbow received its final construction permit on August 30, 1990, Gannett and Rainbow were making progress towards construction of facilities that would be suitable to Rainbow. On September 13, Gannett and Rainbow met to clarify certain points of the transmitter building. This meeting led to a follow up letter from Rainbow on September 17, confirming details about equipment for the transmitter building and promising to respond to Gannett on the drawings of the proposed transmitter building. A copy of this letter is attached hereto as Exhibit 12. As of this date Rainbow representatives seemed happy with the status of

the building project. Rainbow, however, failed to contact Gannett again about the building plans until the following month.

Inexplicably, by a letter dated October 2, 1990, at a point when everyone could see a light at the end of the tunnel, Rainbow complained about something that it had known about for years—that it did not have exclusive use of the aperture on the tower. After a month of the parties exchanging correspondence confirming the fundamental dispute over their rights under the lease, Rainbow filed suit on November 2, 1990 seeking a temporary injunction to prevent Gannett from entering into a lease with Press. A copy of the complaint filed against Gannett is attached as Exhibit 13.

However, Gannett continued to believe that the dispute could be avoided and construction could begin. On November 26, 1990, Gannett sent Rainbow a letter requesting approval on a proposal regarding a modification to the building plans. A copy of the cover letter accompanying these plans is attached as Exhibit 14. Rainbow, however, did not respond until after its preliminary injunction was denied.

Shortly after Gannett's proposal, on November 27, 1990, Judge Marcus, the judge presiding over Rainbow's action against Gannett in the U.S. District Court, ordered that the parties maintain the status quo. This status quo order remained in force until June 1991. Nevertheless, during this period, Gannett continued to take preparatory steps so that once Rainbow responded with direction, Gannett would be able to initiate construction promptly.

Thus, as the record clearly demonstrates, up to the time the status quo order was imposed, Gannett was wholly cooperative with Rainbow and stood ready to proceed with construction. Rainbow's failure to follow through on its October letter or Gannett's November proposal stalled

the project until it once again showed interested in July 1991. In sum, Rainbow voluntarily elected not to respond to Gannett thus preventing the project from moving forward. Gannett, however, fulfilled its obligations under the lease and acted without any influence from Press.

On June 6, 1991, Judge Marcus denied the preliminary injunction and ruled that the lease did not provide Rainbow exclusive rights to the tower. A copy of Judge Marcus's decision is attached hereto as Exhibit 15. The decision validated the fact that Gannett, indeed, was operating in good faith all along with respect to the tower position and it cleared the way for construction to begin.

After Judge Marcus's ruling, on June 25, 1991, Gannett and Press entered into a lease agreement for Press to occupy space at Bithlo Tower. A copy of the lease is attached hereto as Exhibit 16. The negotiations leading up to this agreement were at arms length. At all times during the lease negotiations it was Gannett's intention to protect Rainbow's preexisting interest in the property. Although Rainbow had not yet installed any equipment, Gannett secured a guarantee from Press that required it to take all steps necessary to eliminate any electrical interference to Rainbow in the future. Although Press was obligated to pay a higher initial rent, the lease with Press is the same in all other material respects to the lease with Rainbow (Exhibit 1 hereto).

In the meantime, however, Rainbow continued to try to delay the process further by deciding to pursue an action for a permanent injunction on the same grounds against Gannett. Gannett, for sound business reasons, settled the matter with Rainbow in August 1993. Gannett wanted finality on the issue so that it could have two paying tenants on the tower. Any allusion that this was some indication of guilt is completely groundless and demonstrates a clear misunderstanding of Gannett's position at the time.

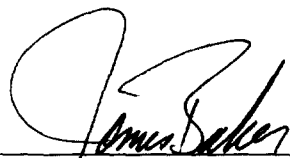
Moreover, Joe Rey's testimony concerning the settlement not only mischaracterizes Gannett's motivation but it breaches the confidentiality provision of the settlement agreement.

I have read the *Initial Decision* and I attest that the inferences to either Gannett's lack of diligence or collusion with Press are absolutely wrong. I know of no basis at all for finding that Gannett colluded with Press. Gannett did not delay construction of the transmitter building because of lease negotiations with Press. I am unaware of any intent by Gannett its agents or its employees throughout Gannett's relationship with Rainbow to hinder or delay Rainbow in its plans to become an operational broadcaster on the Bithlo Tower. To the contrary, Gannett has always treated Rainbow fairly and on an equal footing with Press.

I solemnly swear under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true. In addition, I have reviewed the accompanying Petition For Leave to Intervene to File Exceptions to Reopen the Record and certify that the facts set forth therein are true, complete and correct to the best of my knowledge and belief.


Executed on September 25, 1997

State of Maine
County of Cumberland ss.)



James E. Baker
Chief Financial Officer and Treasurer
Guy Gannett Communications

SWORN AND SUBSCRIBED TO before
me this 25th day of September, 1997.



Notary Public
My Commission expires:

LUANN ARNOLD
NOTARY PUBLIC, MAINE
MY COMMISSION EXPIRES OCTOBER 8, 2001

